Supreme Court, U.S.
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No. 95-1615

In The

Supreme Court of the United States

October Term, 1995

VINCENT R. TAMBURELLO,

Petitioner,

vs.

COMM-TRACT CORPORATION, JOHN F. POLMONARI, EDWARD MENARD and STEVEN DICKIE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TIMOTHY P. VAN DYCK
Counsel of Record
JOSHUA L. DITELBERG
EDWARDS & ANGELL
Attorneys for Respondents
101 Federal Street
Boston, Massachusetts 02110
(617) 439-4444

8036
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

20pp

QUESTIONS PRESENTED

I. Whether the First Circuit was correct in affirming the District Court's dismissal of Petitioner's RICO claims as being preempted by the National Labor Relations Board's primary jurisdiction to adjudicate labor disputes, where Petitioner's claims were premised entirely on allegations of retaliation for Petitioner's activities as a union steward?

II. Whether the First Circuit was correct in affirming the District Court's dismissal of Petitioner's Massachusetts Civil Rights Act claim as being preempted by the National Labor Relations Board's primary jurisdiction to adjudicate labor disputes, where Petitioner's claim was premised entirely on allegations of retaliation for Petitioner's activities as a union steward?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Comm-Tract Corporation advises the Court that it has no parent company, no corporate subsidiaries and no affiliates.

PARTIES BELOW

The proceedings below were a civil action commenced by plaintiff Vincent R. Tamburello. Defendants below, and respondents here, are Comm-Tract Corporation, John F. Polmonari, Edward Menard and Steven Dickie.

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STATEMENT OF JURISDICTION

(i) The Judgment of the United States Court of Appeals for the First Circuit which Petitioner seeks to have reviewed by this Court issued on October 2, 1995.

(ii) No rehearings were requested by Petitioner.

(iii) No cross-petitions for writ of certiorari have been filed.

(iv) Jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article VI, § 2; 18 U.S.C. § 1961; 18 U.S.C. § 1962; 29 U.S.C. § 157; 29 U.S.C. § 158; Mass. Gen. Laws ch. 12, §§ 11H, 11I.

STATEMENT OF THE CASE

The Petitioner, Vincent R. Tamburello ("Tamburello"), was employed by Comm-Tract Corporation ("Comm-Tract") in Massachusetts from April, 1988 to May 10, 1993. He, like all members of his bargaining unit, was subject to the terms of a

collective bargaining agreement between Comm-Tract and the Communication Workers of America, AFL-CIO, Local 4340 (the "Union"). He became a union steward in July, 1991. Soon afterwards, three Comm-Tract officers, John F. Polmonari ("Polmonari"), Edward Menard ("Menard"), and Steven Dickie ("Dickie") (collectively, "Individual Defendants") allegedly began retaliating against Tamburello solely because of his union steward status. (*See* Appendix to Petition at 2a-3a, 17a).

Tamburello alleged that the Individual Defendants engaged in the following instances of retaliation: replacing Tamburello with less experienced workers, thereby preventing him from being eligible for extra lead pay; giving him menial job assignments; reassigning Tamburello to jobs requiring him to travel long distances; withholding Tamburello's personnel file from him; taking Tamburello off projects to deny him overtime pay; forcing Tamburello to take a vacation or face termination of his employment; taking his company vehicle away; and making anti-union statements and threats to him. Tamburello contended that such acts were designed to force him to resign from Comm-Tract. (*Id.* at 3a, 19a).

Tamburello did not file a grievance under the collective bargaining agreement until October, 1992 (after he had stepped down as union steward), nor did he complain to any Union official before then. At no time did he file a charge with the National Labor Relations Board ("NLRB") claiming an unfair labor practice had been committed against him. Tamburello resigned from Comm-Tract on May 10, 1993.

In September, 1993, Tamburello brought suit in the United States District Court for the District of Massachusetts asserting: (i) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c), (d) (1988) by the Individual Defendants, predicated upon alleged extortion

as defined in the Hobbs Act, 18 U.S.C. § 1951 (Counts I and II); (ii) a breach of the collective bargaining agreement by Comm-Tract premised upon 29 U.S.C. § 185 (1988), *i.e.*, § 301 of the Labor Management Relations Act ("LMRA")(Count III); a violation of the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I (1988) (Count IV); and (iv) common law tortious interference with contractual relations (Count V). (*See* Appendix to Petition at 3a, 17a-18a). After an initial motion to dismiss for failure to state a claim was filed on behalf of all Defendants, Tamburello amended his complaint as of right on December 22, 1993. Thereafter, all Defendants again moved to dismiss.

The District Court granted Defendants' motion to dismiss in its entirety on February 17, 1995, dismissed the amended complaint, and entered judgment for Defendants on all counts. (*Id.* at 16a, 21a). The District Court concluded that the NLRB's primary jurisdiction over matters arguably within the scope of §§ 7 and 8 of the National Labor Relations Act ("NLRA") preempted Counts I, II, IV, and V of the amended complaint. (*Id.* at 18a-20a). With respect to Count III, the District Court held that Tamburello did not "refer to any particular provision of the collective bargaining agreement that he claims was breached nor [did] he specify the nature of such breach." (*Id.* at 21a).

On March 16, 1995, Tamburello filed a notice of appeal to the United States Court of Appeals for the First Circuit. He did not appeal the District Court's dismissal of Counts III and V of the Amended Complaint. (*Id.* at 3a n. 1). On October 2, 1995, after argument, the First Circuit issued a written opinion and affirmed the judgment of the District Court. (*Id.* at 15a).

REASONS FOR DENYING THE WRIT

I.

REVIEW OF QUESTION I IS INAPPROPRIATE, GIVEN THE ABSENCE OF A SIGNIFICANT CONFLICT AMONG THE FEDERAL COURTS CREATED BY THE FIRST CIRCUIT'S DECISION.

The decision of the Court of Appeals with respect to Counts I and II of Tamburello's Amended Complaint (*i.e.*, Question I) does not warrant review by this Court. The First Circuit held that Tamburello's RICO claims were preempted by the NLRB's primary jurisdiction over arguable unfair labor practices ("*Garmon* preemption"). (*See* Appendix to Petition at 4a - 13a).

In so holding, the First Circuit applied principles set forth in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), and its progeny. *See, e.g., Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 276 (1971); *Vaca v. Sipes*, 386 U.S. 171, 179-180 (1967). The *Garmon* Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national policy is to be averted." *Garmon*, 359 U.S. at 245. (*See* Appendix to Petition at 4a). The First Circuit agreed with the District Court that Tamburello's allegations, if true, would constitute unfair labor practices prohibited by the NLRA. (*Id.* at 6a). Accordingly, Tamburello's RICO claims were properly dismissed in accordance with *Garmon* preemption. (*Id.* at 10a).

The First Circuit described three "generally recognized exceptions to the NLRB's primary jurisdiction," and concluded that Tamburello's RICO claims came within none of them. (*Id.* at

6a - 7a). The first exception is "where Congress has expressly carved out an exception to the NLRB's primary jurisdiction." (*Id.* at 6a). As the First Circuit noted, Congress did *not* carve out any such exception with respect to Hobbs Act extortion, as alleged by Tamburello. To the contrary, "the only labor-related 'racketeering' activity expressly listed as predicates to liability under RICO are actions concerning restrictions of payments and loans to labor organizations, or those relating to embezzlement from labor funds." (*Id.*) (*citing* 18 U.S.C. § 1961(1)(C); 29 U.S.C. §§ 185, 501(c)). The second exception, when regulated activity is grounded in "interests so deeply rooted in local feeling" that the states are not deprived of the ability to act, did not apply to Tamburello's RICO claims, because it does not concern itself with the relationship between two federal laws (*i.e.*, RICO and the NLRA) (*Id.* at 7a). Tamburello does not take issue with the First Circuit's formulation or application of this exception.

The third exception "holds that the NLRB's exclusive jurisdiction does not apply if the regulated activity is merely a peripheral or collateral concern of the labor laws." (*Id.*). This exception was explained by this Court in *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 626 (1975) ("[T]he federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies[.]"). Here, the First Circuit determined that "the unfair labor practice issues implicated by Tamburello's complaint are not merely collateral to his RICO claims"; accordingly, the First Circuit concluded that this exception did not apply. (Appendix to Petition at 9a) (footnote omitted).

Tamburello contends that this Court "has never squarely addressed" the issue created by the third exception, "namely whether RICO, a federal criminal statute with an express civil remedy, can be gutted by another federal statute, the NLRA[.]"

(Petition at 4-5). Tamburello is incorrect. This Court addressed the relationship between the NLRA and other federal laws regulating labor-related activities in *Connell*. The *Connell* doctrine has been applied by this Court in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 85 (1982), and by numerous lower federal courts. Further, there is no significant difference among the federal courts in assessing the particular relationship between RICO and the NLRA requiring this Court's attention.

As the First Circuit accurately stated, "several federal courts take the position that courts must defer to the primary jurisdiction of the NLRB if the underlying conduct of the RICO claim is wrongful only by virtue of, or reference to, the labor laws." (Appendix to Petition at 7a - 8a). *See, e.g., Brennan v. Chestnut*, 973 F.2d 644, 646 (8th Cir. 1992); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 651, 662 (7th Cir. 1992); *Mann v. Air Line Pilots Assoc.*, 848 F. Supp. 990, 993 (S.D. Fla. 1994); *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368, 370 (S.D. Ill. 1990); *MHC, Inc. v. International Union, United Mine Workers of Am.*, 685 F. Supp. 1370, 1378 (E.D. Ky. 1988); *Brown v. Keystone Consol. Indus., Inc.*, 680 F. Supp. 1212, 1224-1225 (N.D. Ill. 1988); *Butchers' Union, Local No. 498 v. SDC Inv. Inc.*, 631 F. Supp. 1001, 1011 (E.D. Cal. 1986). *See also Hood v. Smith Transfer Corp.*, 762 F. Supp. 1274, 1287 (W.D. Ky. 1991)(noting that "any jurisdictional conflict between the NLRA and RICO is merely illusory."). These courts consistently took this position regardless of whether they concluded, on the facts before them, that preemption was appropriate.

Further, the cases Tamburello himself relies upon are not at all inconsistent with this position given the facts confronting those courts. In *United States v. Boffa*, 688 F.2d 919, 923-924 (3rd. Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983), the RICO predicate acts included obstruction of justice, and mail fraud in a scheme to secure higher profits. In *United States v. Thordarson*,

646 F.2d 1323, 1325 (9th Cir. 1981), the RICO predicate acts included the use of explosives to damage vehicles during a strike, and arson.[1] Such acts are wrongful without reference to federal labor law, unlike those acts which Tamburello alleged were committed by the Individual Defendants. (*See* Appendix to Petition at 9a-10a.). *See also Talbot*, 961 F.2d at 662 (distinguishing *Boffa* on such grounds).

Tamburello also asserts that the First Circuit's decision dismissing his RICO counts as preempted by the NLRB's primary jurisdiction is in error because "the constitutional doctrine of preemption obviously deals with federal/state conflicts rather than with federal/federal conflicts of applicable law." (Petition at 5). This argument deserves little attention. In describing the relationship between RICO and the NLRA, the First Circuit used the term, "preemption." (*See* Appendix to Petition at 5a). This nomenclature is consistent with that used by most other federal courts that have considered the issue. *See, e.g., Talbot*, 961 F.2d at 659. Indeed, this Court has referred to the primary jurisdiction of the NLRB as "preemp[ting] state *and federal* jurisdiction to remedy conduct that is arguably protected or prohibited by the [NLRA]." *Lockridge*, 403 U.S. at 276. (emphasis added). Quite simply, as the First Circuit recognized, the *Garmon* doctrine of NLRB primary jurisdiction which "was originally concerned only with federal supremacy over conflicting *state* laws . . . has been extended to cover the relationship between the NLRA and other federal statutes." (Appendix to Petition at 5a n. 2) (*citing Connell, supra*) (emphasis in original).

Tamburello's other argument regarding Question I also is without merit. Tamburello asserts that "when a breach of the

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1. They also included conversion of union funds in violation of 29 U.S.C. § 501(c) which was one of the two labor-related "racketeering" activities expressly listed as a predicate to RICO liability. *See* 18 U.S.C. § 1961(1)(C).

Union's Duty of Fair Representation ["DFR"] is alleged . . . resort to the federal courts in such instances is proper and the NLRA therefore is no impediment to the same." (Petition at 6) (*citing Breininger v. Sheet Metal Workers Int'l Assoc., Local Union No. 6*, 493 U.S. 67 (1989) and *Vaca, supra*). Tamburello, however, did not appeal the District Court's dismissal of Count III of the Amended Complaint. (*See* Appendix to Petition at 3a n. 1). Accordingly, he "ha[d] no viable duty of fair representation claim before the [Court of Appeals.]" *(Id.* at 13a). Further, Tamburello's RICO counts were not "hybrid" breach of contract/ breach of DFR claims brought under § 301 of the LMRA. To the extent that *Breininger* and *Vaca* furnish an exception to *Garmon* preemption, it is only with respect to such claims. (*Id.*).

The Court of Appeals' decision affirming the dismissal of Tamburello's RICO counts is sound. Congress, through the passage of the NLRA, sought to "create a uniform, nationwide body of labor law interpreted by a centralized expert agency — the [NLRB]." (Appendix to Petition at 5a). Over several decades, this Court has crafted a broad doctrine of NLRB primary jurisdiction over labor controversies, making it clear that artful pleading cannot displace the NLRB's function in settling labor disputes. *See, e.g., Lockridge*, 403 U.S. at 292 ("It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern"). If theories such as Tamburello's RICO counts are permitted to elude NLRB preemption, the NLRB's role as chief arbiter of labor disputes will be severely compromised; "there are few unfair labor practices which could not be similarly repackaged." *Chaulk v. MCAD*, 70 F.3d 1361, 1370 (1st Cir. 1995). This would create a "system of labor dispute adjudication parallel to the NLRB . . . leaving the state and federal courts to grapple piecemeal with issues Congress intended primarily for NLRB resolution." *Id.* Accordingly, the First Circuit's decision below does not require review by this Court.

II.

IN VIEW OF THE FIRST CIRCUIT'S CORRECT APPLICATION OF SETTLED PRINCIPLES OF LAW, REVIEW OF QUESTION II IS UNWARRANTED.

The First Circuit's decision with respect to Count IV of Tamburello's Amended Complaint (*i.e.*, Question II) likewise does not call for review by this Court. The First Circuit held that *Garmon* preemption required dismissal of Tamburello's Massachusetts Civil Rights Act claim. (*See* Appendix to Petition at 13a - 15a). In so holding, it agreed with the District Court that Respondents' alleged conduct did not fall within the "local interests" exception to *Garmon* preemption. One of the prerequisites of this exception is that "the controversy presented to the state court" be different from "that which could have been, but was not, presented to the [NLRB]." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978). The First Circuit noted that the controversy raised by Tamburello's Massachusetts Civil Rights Act claim was "identical" to that which would be heard by the NLRB. (*See* Appendix to Petition at 15a). Accordingly, it relied upon *Garmon* and *Sears, Roebuck* in concluding that preemption was appropriate. (*Id.*).

The First Circuit's decision is correct and does not warrant review by this Court. In his Petition, Tamburello asserts that it "is in conflict with applicable decisions of this Court," although he cites no such decisions. (Petition at 6). This is not surprising. The *Garmon* preemption doctrine is well-settled law, and the First Circuit properly applied *Sears, Roebuck* to Tamburello's claim under the state civil rights statute. *See, e.g., Belknap v. Hale*, 463 U.S. 491, 510 (1983) (citing *Sears* with approval); *Local 926,*

IUOE, AFL-CIO v. Jones, 460 U.S. 669, 681 (1983) (same).[2]

Tamburello confuses *Garmon* preemption with preemption of state-law actions by § 301 of the LMRA. In this regard, Tamburello asserts that his claim "could be resolved without resort to interpretation of the Collective Bargaining Agreement." (Petition at 7). Apparently, he makes such an assertion because this Court has held that if a "state-law claim can be resolved without interpreting the [collective bargaining] agreement itself," it is not preempted by § 301. *Lingle v. Magic Chef, Norge Div.*, 486 U.S. 399, 409-410 (1988). This has nothing to do with *Garmon* preemption, *i.e.*, diminishing "significant risk of state interference with the unfair labor practice [jurisdiction] of the NLRB." (Appendix to Petition at 15a). Section 301 preempts state-law claims involving "[s]uits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations," *i.e.*, the interpretation and enforcement of collective bargaining agreements. However, Tamburello's claim under Mass. Gen. Laws ch. 12 §11I was not to enforce rights arising under the collective bargaining agreement; it was to obtain a statutory

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2. Tamburello further asserts that the First Circuit's decision affirming the dismissal of Count IV of the Amended Complaint is in error because "a breach of the Union's DRF [*sic*] was properly alleged." (Petition at 7). This is irrelevant to the instant consideration of *Garmon* preemption. The duty of fair representation inheres in a union; a breach of such duty is a predicate to employer liability only in a breach of contract action arising under § 301 of the LMRA. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 185-193 (1967). Tamburello's Massachusetts Civil Rights Act claim was not such an action.

remedy akin to that available under 42 U.S.C. § 1983 (1988).[3] Accordingly, the scope of § 301 preemption is irrelevant to dismissal of Count IV of Tamburello's Amended Complaint.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

TIMOTHY P. VAN DYCK
Counsel of Record
JOSHUA L. DITELBERG
EDWARDS & ANGELL
Attorneys for Respondents
101 Federal Street
Boston, MA 02110
(617) 439-4444

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3. Tamburello characterizes the Massachusetts Civil Rights Act as "in essence a state version of the Hobbs Act, but with an express civil remedy." (Petition at 6). This ignores what the Massachusetts courts and the federal courts construing the Massachusetts Civil Rights Act have said with respect to the statute's purpose. *See, e.g., Thierren v. Hamilton*, 849 F. Supp. 110, 115 (D. Mass. 1994) ("[t]he Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11I, and 42 U.S.C. § 1983 are parallel statutes."); *Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 822-23, 473 N.E.2d 1128, 1131 (1985). Regardless, it is clear that the statute is not intended to vindicate rights grounded in contract, as Tamburello implicitly acknowledges.